UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Western Section

LORETTA ROLLAND, et al.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 98-30208-KPN
DEVAL PATRICK, et al.	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF APPROVAL OF THE SETTLEMENT AGREEMENT ON ACTIVE TREATMENT

I. Introduction

On April 14, 2008, the Court preliminarily approved the Settlement Agreement on Active Treatment ("the Agreement"), as well as a modified notice to class members. Pursuant to a schedule approved by the Court on March 25, 2008, class members had until May 12, 2008 to file any objections to the proposed settlement. This Memorandum is submitted as required by the scheduling order.[1] For the reasons set forth herein, the Settlement Agreement on Active Treatment should be approved as fair, reasonable, and adequate.

[1] In conjunction with the parties' Joint Motion to Preliminarily Approve Settlement Agreement (Doc. # 469), on April 7, 2008 the plaintiffs filed an initial memorandum (Doc. # 470) that outlined the major provisions of the Settlement Agreement on Active Treatment and the reasons why it should be approved by the Court. The explanations and rationales set forth in that memorandum are incorporated by reference and will not be repeated here. In addition, at a hearing on the Joint Motion on April 14, 2008, the plaintiffs described the provisions of the Agreement in more detail, and responded to questions from the Court.

II. The Settlement Agreement on Active Treatment

Since the Court already has been provided a description of each of the provisions of the Agreement, rather than repeating that description here, this Memorandum will elaborate on the issues of concern identified by the Court.

A. The Number and Pace of Community Placement

The Agreement provides for the placement of 640 class members over four years. ¶¶ 13-17. The number of placements should be adequate to serve all class members who would benefit from community living,[2] provided that the number of long term (over ninety days) admissions do not substantially increase, and that the rate of diversion remains stable or improves.[3] As noted in the plaintiffs' initial memorandum, the pace of community placements is more ambitious than under the original Settlement Agreement, and as rapid as DMR has ever done in other community integrations cases or initiatives.

B. Transition Services for Persons on the Rolland Community Placement List

As provided in ¶ 28 of the Agreement, all class members who are on the list for community placement will continue to receive the specialized services they currently receive, as well as additional services and supports designed to facilitate their transition to the community. These transition services are described in ¶ 28, and will be evaluated by the

---

[2] The number assumes that most persons who would benefit from community placement will agree to move to the community. As more fully described in subsection II(C), the Agreement requires the defendants to undertake a number of strategies and actions to inform, educate, and encourage class members and their guardians to accept placement. And as discussed in subsection V(G), objections concerning involuntary placement misconstrue the Agreement and ignore requirements of federal and state law.

[3] This Agreement includes far more protections concerning the diversion process than the original Settlement Agreement, including a list of successful diversionary practices currently in effect that must be maintained, an obligation to make best efforts to sustain at least the current rate of diversions, and corrective actions that must be taken if the diversion rate falls. *See* ¶¶ 29-30. While these safeguards afford reasonable protections against foreseeable risks, it is not possible to predict with certainty that there will not be any class members who could benefit from community placement still in a nursing facility on June 30, 2012. However, it is possible to say with certainty, that all such persons should be receiving active treatment. *See* Agreement, ¶ 27.

Monitor pursuant to ¶ 34.

As required by ¶ 28(a), each class member will receive a transition plan that supplements and is integrated into the person's Rolland Individual Service Plan (RISP). Pursuant to that paragraph, DMR has developed a standard template for the transition plan, with considerable input from the Monitor and the plaintiffs. The parties agree that this Transition Plan, which is attached as Exhibit 1, Appendix 1, satisfies the defendants' obligation under ¶ 28(a).

In order to more fully describe what transition services include, as well as to define the standard and process for evaluating transition services, the parties have developed a Joint Plan for Transition Services, which is attached as Exhibit 1. The Joint Plan identifies the specific requirements of each of the subprovisions of ¶ 28. For instance, it explains what is meant by "intensify the involvement of the service coordinator" in ¶ 28(b), by "expanding opportunities for specialized services that are provided in the community" in ¶ 28(c), and by "transition services in ¶ 28(d). *See* Joint Plan at 1-2. It describes the process that will be implemented by DMR to develop the transition plan. *Id.* at 2, Appendix 2. The Joint Plan also specifies criteria for evaluating each element of transition services. For example, it establishes compliance standards for the Transition Plan, intensified service coordination, expanded specialized services, and new transition services. *Id.* at 3-4. It also delineates the Monitor's review process, timetable, and sampling methodology for her evaluation of transition services as provided in ¶ 34. *Id.* at 5. Finally, it mandates reporting on issues concerning transition services that are not covered by the Monitor's evaluation, such as the

content and implementation of transition plans for persons who are leaving nursing facilities each year. *Id.* at 6.[4]

C. Actions to Encourage Community Placement

The Agreement identifies a number of strategies and actions that DMR must take to encourage class members and guardians to accept community placement. ¶¶ 20-21. Based upon experience here and in other cases, many of these initiatives will take several months to develop, at least an additional six months to implement,[5] and often a year or two to achieve their intended outcomes. Since these educational and outreach initiatives will not begin until at least the fall of 2008, and may not positively impact persons who have not consented to community placement for two years (July 2010), it makes sense to allow these initiatives the maximum time to achieve their goals. Therefore, absent unusual or compelling circumstances, class members who currently oppose placement will not be removed from the Community Placement List until July 2011, when the final placement group is identified.

D. Active Treatment for Persons Not on the Placement List

All class members who are not on the Rolland Community Placement List, who are removed from the List, or who are not scheduled for placement and actually placed in the community by June 30, 2012 must be promptly provided with active treatment, as defined by the Court's orders and the Monitor's Active Treatment Protocol. *See* ¶¶ 24, 27. Thus,

---

[4] The Transition Plan and Joint Plan on Transition Services constitute agreements by the parties in conjunction with the Settlement Agreement on Active Treatment within the meaning of Fed. R. Civ. P. 23(e)(2). This explanation of those agreements, and their attachment to this Memorandum, constitute the statement required by the Rule.

[5] Several of these activities, such as the family to family project required by ¶ 20(d), are ongoing efforts that depend on individual contacts and evolving relationships. There is no more powerful persuasion than the words and support of a family/guardian who initially resisted placement but who gradually came to accept a transition and can now describe and demonstrate the benefits of community living.

class members who will not receive the primary benefit of the Agreement – community placement and transition services – will be provided with active treatment consistent with current court orders.

III. The Standards for Approval of a Settlement Agreement

A. The Legal Standard

Fed. R. Civ. Pro. 23(e)(1)(C) requires a court to determine whether a proposed settlement's "terms are fair, reasonable and adequate." *Bussie v. American Financial Corp.*, 50 F. Supp.2d 59, 72 (D. Mass. 1999) (citing *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 67 (D. Mass. 1997)). The court must consider both the substantive terms of the settlement compared to the likely result of further litigation, and "the negotiating process by which the settlement was reached." *Duhaime*, 177 F.R.D. at 67 (citing *Weinberger v. Kendrick*, 698 F.2d 61, 69 (2d Cir. 1982) *cert. denied*, 464 U.S. 818, 104 S. Ct. 77, 78 L.Ed.2d 89 (1983)). The court's special responsibility to protect class members includes an evaluation of "... whether the proposal, taken as a whole, is fair, adequate, reasonable and in the best interests of all those who will be affected by it." *Giusti-Bravo v. U.S. Veterans Administration*, 853 F. Supp. 34, 36 (D. P.R. 1993) (citing Wright, Miller and Kane, Federal Practice and Procedure: Civil 2d § 1797.1; *In re Corrugated Containers Antitrust Litigation*, 643 F.2d 195 (5th Cir.1981); *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.1975)). Although the fairness process is most commonly invoked in lieu of a trial on merits, it is equally relevant to a settlement in a class action case reached after trial and court-ordered relief, and even after considerable time has been spent unsuccessfully implementing negotiated or court-ordered remedies.

1. Fairness

In order to approve a settlement, a court is obliged to conduct an independent evaluation of its fairness. In making this determination, a district court must depart from its traditional role as an adjudicator in the ordinary adversarial litigation and instead assume a role as "a guardian for class members who have not received notice or who lack intellectual or financial resources to press objections." *Duhaime*, 177 F.R.D. at 67.

There are a number of factors that the court may consider in evaluating the fairness of the process by which the settlement was negotiated, including whether:

1. the settlement has been arrived at by arm's-length bargaining;
2. sufficient discovery has been taken or investigation completed to enable counsel and the court to act intelligently;
3. the proponents of the settlement are counsel experienced in similar litigation; and
4. the number of objectors or interests that they represent is not large when compared to the class as a whole.

Newberg, Newberg on Class Actions, Third Ed., § 11.41 (1992) (hereafter Newberg).

The proponents of the settlement have the burden of proving its fairness. Newberg at §11.42 (citing *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106 (7th Cir.) *cert denied*, 444 US 870 (1979)). This burden is initially met if the settlement is recommended by counsel after arm's length negotiations.

> The use of the burden of proof concept in the context of settlement approvals for class or derivative actions goes primarily to the burden of providing the court with sufficient factual background concerning the ease or difficulty in proving the merits and defenses for or against the claims raised and the scope and extent of potential relief available after adjudication as compared to relief obtained in settlement.

Id.

The burden of proof born by the settlement's proponents places a responsibility on the counsel to provide the court with sufficient information about the settlement.

> Counsel for the parties are the main source of information concerning the settlement. They must fully disclose to the court all agreements and understandings and be prepared to explain how the settlement was reached and why it is fair and reasonable. They must also disclose any facet of the settlement that may adversely affect any member of the class or does not treat all members of the class in the same manner.

Newberg at §11.42 (quoting The Manual for Complex Litigation, Second §30.42 (1985)).

2. Reasonableness

In making reasonableness determinations, courts essentially weigh what the plaintiffs obtained through the proposed settlement agreement with what they would have likely achieved at trial or through supplementary enforcement proceedings. This determination is not based on a single, inflexible litmus test but, instead, reflects a studied review of a wide variety of factors bearing on the central question of whether the settlement is reasonable in light of the uncertainty of litigation and the successful implementation of court-ordered or negotiated remedies. *Bussie*, 50 F. Supp.2d at 72 (citing *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F.Supp. 819, 822-23 (D. Mass. 1987)); *Duhaime*, 177 F.R.D. at 68 (citing *Santana v. Collazo*, 714 F.2d 1172, 1175 (1st Cir. 1983)). In making reasonableness determinations, courts consider the value of the settlement in light of all the circumstances. *DeSimone v. Industrial Bio-Test Labs, Inc.*, 83 F.R.D. 615 (S.D.N.Y. 1979)(court identified nine factors relied upon in the Second Circuit Court of Appeals).

3. Adequacy

The court must be convinced that the settlement achieves an adequate advantage for the plaintiff class in exchange for foregoing litigation rights against the defendants. Newberg at §11.46. Despite the fact that settlement benefits can be somewhat speculative in nature and capable of only approximate valuation, a settlement may be approved as adequate if it secures some advantage for the class. *Id.*

B. The Criteria for Applying the Standard

There are numerous factors that must be taken into consideration by courts when determining if a settlement is fair, reasonable and adequate including: (1) the likelihood of recovery or likelihood of success on the merits; (2) the amount and nature of discovery or evidence; (3) the settlement terms and conditions; (4) the recommendation and experience of counsel; (5) the future expense and likely duration of litigation; (6) the recommendation of neutral parties, if any; (7) the number of objectors and the nature of objections; and (8) the presence of good faith and the absence of collusion. *Giusti-Bravo*, 853 F. Supp. at 36. Although the weight and relevance of each of these factors may differ in a post-judgment rather than a pre-litigation context, these factors, with some adjustment for the stage of the litigation, must be weighed by the court in determining if a settlement is fair, reasonable, and adequate.

1. Likelihood of recovery, or likelihood of success

The court is required to judge the reasonableness of the proposed compromise by evaluating the probable outcome of the litigation and the terms of the settlement and by weighing the remedies the class could secure from the settlement against the probable costs and results of continued litigation. *Giusti-Bravo*, 853 F. Supp. at 36 (citing *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14, 101 S. Ct. 993, 998 n. 14, 67 L.Ed.2d 59 (1981)). One important consideration is whether the plaintiffs' "likelihood of success on the merits" balances appropriately against "the amount and form of the relief offered in settlement." *Duhaime*, 177 F.R.D. at 68 (quoting *Santana*, 714 F.2d at 1175). In doing so, however, the court may not decide the merits of the case or resolve unsettled legal questions. *Carson*, 450 U.S. 79, 88 n. 14.

2. Amount and nature of discovery or evidence

The court is required to ascertain whether sufficient evidence has been obtained through discovery to allow a determination of the adequacy of settlement. *Giusti-Bravo*, 853 F. Supp. at 38. "The stage of the proceedings at which settlement is reached is

important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Duhaime*, 177 F.R.D. at 67 (citing *Armstrong v. Board of School Directors of Milwaukee*, 616 F.2d 305, 325 (7th Cir.1980)).

3. Settlement terms and conditions

The terms and conditions of the settlement must be examined carefully by the court in making its determination about whether it adequately protects class members and vindicates their rights. However, the court is not to expect the best possible result.

> In evaluating the substantive fairness of a class action settlement, the court cannot, and should not, use as a benchmark the highest award that could be made to the plaintiff after full and successful litigation of the claim. Nor should the court consider cases of particular individual class members to determine whether each and every member of the class receives the fullest possible compensation.

Duhaime 177 F.R.D. at 68; *Florida Trailer and Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir.1960)).

4. Recommendation and experience of counsel

The court should determine the proper weight to place on the judgment of the parties' respective counsel. When they are experienced attorneys who are knowledgeable about the facts and claims, their representation to the court that the settlement provides relief to the class which is fair, reasonable and adequate should be given significant weight. *Bussie*, 50 F. Supp.2d at 72.

5. Future expense and likely duration of litigation

A fifth factor in evaluating the appropriateness of a settlement is the likely expense of continuing the litigation and the likely duration of the litigation. Newberg at § 11.49. One court held:

> [T]he Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect "It has been held proper to take the bird in the hand instead of a prospective flock in the bush."

Oppenlander v. Standard Oil Co. 64 F.R.D. 597, 624 (D. Colo 1974).

Another court found that although an action had been litigated for six years, it would be a protracted period before a final decision on the plaintiffs' claims would occur. When combining the time projections with the enormous expenses incurred in such prolonged litigation, the court found that there were strong arguments in favor of approval of a settlement. *Giusti-Bravo*, 853 F. Supp. at 40.

6. Recommendation of neutral parties, if any

Recommendations of neutral parties are also important in determining whether a proposed settlement is fair, reasonable and adequate. *Giusti-Bravo*, 853 F. Supp. at 40.

7. Number of objectors and nature of objections

The number of requests for exclusion from the settlement, as well as the number and substance of objections filed, is relevant to a court's analysis of the settlement. *Bussie,* 50 F. Supp.2d at 72 (citing *In re Painewebber Partnerships Litig.*, 171 F.R.D. at 106 (noting that favorable reaction of class to settlement, albeit not dispositive, constitutes strong evidence of fairness of proposed settlement and supports judicial approval)); *Duhaime*, 177 F.R.D. at 70 *Giusti-Bravo*, 853 F. Supp. at 40.

8. The presence of good faith and the absence of collusion

The court looks to a number of factors in determining whether the settlement was negotiated in good faith and whether there is an absence of collusion between the parties, including the length of the settlement process, the nature of the process, and the timing of a discussion and settlement of attorney's fees. Newberg at §11.47.

Settlement negotiations that were conducted at arms' length over several months support "a strong initial presumption" of the settlement's substantive fairness. *Bussie* 50 F.

Supp.2d at 77. A second factor in evaluating whether the settlement process was fair is whether there is evidence of arm's length negotiation. *Duhaime*, 177 F.R.D. at 68.

In general, a settlement arrived at after genuine arm's length bargaining may be presumed to be fair. "When sufficient discovery has been provided and the parties have bargained at arm's length, there is a presumption in favor of the settlement." *Duhaime*, 177 F.R.D. 54 (citing *City Partnership Co. v. Atlantic Acquisition Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir.1996)). Nonetheless, the court has an obligation to consider the substantive fairness of the relief made available to settling class members, and this presumption will not stand if the court determines that the substance of the agreement is not fair and adequate.

IV. Response of the Plaintiff Class to the Settlement Agreement

In response to the Class Notice, a number of inquiries were made to plaintiffs' counsel concerning the Agreement. An affidavit from Cathy Costanzo describing these inquiries is attached as Exhibit 2, and a log of these inquiries is attached as Appendix A to the affidavit. As more fully described in the affidavit, the inquires concerning class members who resided in nursing facilities other than the Groton Pediatric Nursing Facility mostly sought general information or requested copies of the Agreement. *See* Aff. at ¶ 5. None asked about the transition services or active treatment provisions of the Agreement. Most were concerned about community placement, and many were more comfortable with the Agreement after they better understood its provisions.

In addition, a number of family members and guardians from the Groton Pediatric Nursing Facility in Groton, MA inquired about the community placement provisions of the Agreement. *See* Aff. at ¶ 4. To address what appeared to be misperceptions and

misinformation about these sections, representatives of the Department of Retardation and the plaintiffs met for several hours with a group of guardians at the facility on May 6, 2008.[6] Despite prior class notices of the initial Settlement, families indicated that they did not know they were part of this case and did not want to part of the class.[7] They also stated that they steadfastly opposed community placement. The plaintiff and defendant representatives explained the Agreement, and made clear that its provisions would not result in involuntary community placement.

As of May 12, 2008, a total of forty-seven written objections to the Agreement have been filed by guardians or families of class members.[8] Forty-three of these objections were submitted in a formal Opposition (Doc. # 477), filed by an attorney representing the "Groton plaintiffs."[9] Thus, other than the representatives of class members who live at the Groton facility, only three class members – or approximately .0035 % of the class – indicated their dissatisfaction with the Agreement.

V. The Court Should Approve the Settlement Agreement on Active Treatment

Each of the factors that a court must consider in determining whether a proposed settlement is fair, reasonable, and adequate support approval of the Agreement.

---

[6] There was substantial evidence that the guardians' concerns were fueled, if not incited, by the nursing facility administrator, who generally opposed placement for most, if not all, residents of the facility. After the portion the meeting with representatives of the plaintiffs and defendants concluded, the administrator initiated a separate, private meeting with families to decide what "we are going to do."

[7] The same nursing administrator also indicated that no notice had ever been sent to families or the facility concerning the initial settlement, even though she later acknowledged she was not working at the facility in 1999 when the first class notice was distributed. Efforts by the plaintiffs' counsel to obtain consent to review records of residents and monitor specialized services during the early years of implementation have been consistently rebuffed.

[8] Two letters were submitted on behalf of one class member (DG).

[9] Although the Opposition states that it is filed on behalf of forty-three class members, written objections are attached on behalf of only eleven class members. One of these (DB) is actually an email to the same nursing administrator who organized the meeting and who apparently was collecting, if not coordinating, written objections.

A. Likelihood of Success

Although for the past seven years the Court has issued numerous orders on active treatment, the Court Monitor's most recent report on the implementation of the Active Treatment Standards demonstrates massive noncompliance. Thus, there is little question that the plaintiffs would be successful in proving noncompliance and obtaining additional relief. The real question now is not the likelihood of prevailing in further litigation, but rather the likelihood that further orders on active treatment will make a meaningful difference in the lives of most class members.

As explained in detail in the plaintiffs' initial memorandum, creating the capacity to provide active treatment, and particularly reforming over three hundred nursing facilities where class members currently reside, is an overwhelming task that will consume vast resources, will require enormous staff training and supervision efforts, and will take years to complete. As a result, the probability of the defendants' complying with the Court's Active Treatment Standards for 800 class members in nursing facilities any time in the near future is tenuous at best, and highly improbable at worst.

Alternatively, obtaining more effective relief through litigation – and particularly securing over six hundred community placements in four years – is extremely challenging. At best, it would require a new lawsuit, new discovery, new evidence, and a new trial. The defendants would point to their efforts to implement the original Settlement Agreement as a defense. Moreover, and perhaps most significantly, it is questionable whether the plaintiffs would obtain community placement relief from the Court that is as comprehensive or as detailed as that contained in the proposed Agreement. Finally, given the possibility of an

appeal, it is doubtful whether class members would receive the benefit of any judicially-ordered placement relief anywhere as quickly as provided in the Agreement.

Thus, this Agreement was negotiated in an unusual context. The plaintiffs have a high likelihood of prevailing in a noncompliance or enforcement action, but are not likely to benefit – at least anytime soon – from further orders concerning active treatment. It is apparent to all concerned that a different direction is necessary.[10] That direction was envisioned by the parties in the original Settlement Agreement,[11] has been requested repeatedly by the plaintiffs in past enforcement actions, and now is supported by the defendants. The Agreement is the most efficient, most effective, and most speedy method of achieving compliance with federal law, and perhaps the only method of ensuring that over six hundred class members can live in integrated community settings.

B. The Evidence of a Rights Violation

The Monitor's January 24, 2008 report on active treatment leaves no doubt that there is a pervasive, ongoing violation of federal law and the Court's Active Treatment Standards. *See* Report at 1 (Doc. # 467). But the report also reflects considerable skepticism that this violation can be cured without a vast transformation of the level of care provided in nursing facilities. *Id.* at 2 In fact, the report itself recommends that the defendants consider community placement and nursing facility transfers for many class members in lieu of upgrading all nursing facilities where class members currently reside. *Id.* (Recommendation 2). Thus, as noted above, the real issue in considering the fairness of the Agreement is not whether class members are entitled to additional relief, but what relief is most effective,

[10] It is neither realistic nor legally mandatory that the defendants simultaneously develop an active treatment program and community placements for 640 class members.

[11] Pursuant to ¶ 14 of that Settlement Agreement, the defendants could satisfy their obligation to provide specialized services by providing class members with community services and supports.

most timely, and most consistent with the needs and rights of class members under federal law. The Agreement reflects an honest assessment by counsel for all parties of this remedial problem, and represents an informed judgment, based upon knowledge of all relevant facts, of the advantages of the Agreement.

C. The Settlement Terms and Conditions

The Agreement is comprehensive and secures significant relief for class members, as described in the initial memorandum and in section II, *supra*. Although more or quicker reforms may be desirable, and though there are certain limitations in the proposed settlement, the terms of the Agreement strike a reasonable balance between the interests of all parties and afford class members the best opportunity to receive the most effective relief in a timely fashion.

D. The Recommendation and Experience of Counsel

Plaintiffs' counsel are experienced attorneys. Most of them have a significant background in disability law and three have extensive experience in litigating, negotiating, and implementing structural reform injunctive cases on behalf of individuals with disabilities in institutional settings. Another of the plaintiffs' counsel is an experienced litigator with a private firm who has litigated several class action cases. They all participated in the drafting of the proposed Agreement, debated its terms at length, and are unanimous in recommending its approval.

E. The Future Expense and Duration of Litigation

The plaintiffs have already spent considerable resources on litigating this case and obtaining multiple orders on active treatment. Nevertheless, compliance with these orders remains elusive, and in the far distant future at best. Spending more time, money, and

expert resources trying to achieve this result through further enforcement motions is neither as productive nor as effective as the prompt benefits offered by the Agreement.

F. The Recommendation of Neutral Parties

Although the Monitor has not explicitly endorsed the Agreement, she did participate in most of the negotiation meetings concerning the Agreement, and offered numerous suggestions and improvements to various drafts that were incorporated in the final Agreement. She was directly involved in the drafting of the Transition Plan and Joint Plan on Transition Services and has indicated her approval of these documents.

G. The Number of Objectors and The Nature of Objections

As noted above, virtually all of the objections are from guardians of residents at the Groton Pediatric Nursing Facility. They do not object to any of the provisions concerning specialized services, transition services, or active treatment. Although the Opposition mistakenly focuses on the Court's January 16, 2007 Order on the Diversion Plan, there is no concern expressed with respect to the diversion provisions of the Agreement, or obligations to prevent unnecessary admissions. Instead, the entire focus of the Opposition of the "Groton plaintiffs" is to the community placement provisions of the Agreement, and specifically to the misplaced perception that these provisions will inevitably result in involuntary community placements. These objections should be rejected for several reasons.

First, based upon the parties' collective experience over the past seven years in implementing the community placement provisions of the original Settlement Agreement, as well as DMR's experience over the past four decades in implementing community placements for residents of other institutions, there is overwhelming evidence that many

guardians and family members who initially are opposed to community placement subsequently change their minds when they learn about the benefits of community living, their role in the transition process, and the supports that will be available in the community. This evidence applies with equal force to guardians who staunchly are opposed to placement, as well as to those who are tentative or simply unsure what is best for their wards. This experience led to the outreach and education provisions of the Agreement, which are likely to result in many class members, including those at Groton, to accept and ultimately embrace community placement.[12]

Second, the decision of whether a particular individual will be transitioned to the community will be based upon a careful clinical evaluation by qualified professionals of the individuals' strengths and needs, and the community service systems' ability to meet those needs. Specifically, through the transition planning process and the broader RISP process, an interdisciplinary team will determine whether the class member meets the placement standard set forth in ¶ 4 of the Agreement.[13] The team includes the class member and his/her guardian and family. The transition process includes a right to appeal any adverse decision. The "Groton plaintiffs'" claim that the decision to place an individual class member has already been made by DMR, based entirely upon an initial list, is simply inaccurate, and their fear that this decision is irreversible is unfounded. Opp. at 4, 7; Voss Aff. at ¶ 9. Rather, consistent with state and federal law, placement decisions will be implemented only after an individualized clinical review of each class member on the Placement List determines that such placement is appropriate.

---

[12] The plaintiffs anticipate presenting evidence of this phenomenon at the fairness hearing.

[13] This is the same placement standard that was incorporated in the original Settlement Agreement, *see* ¶ 3, and that has been applied without a single appeal or challenge for the past seven years to over a thousand class members.

Third, with respect to the issue of consent to placement, the Agreement simply incorporates state and federal law. While a community placement will not be implemented over the expressed objection of a class member or guardian, this does not mean that the individual has an unqualified right to remain in the nursing facility of his choice. The Supreme Court has already made clear that nursing facility residents do not have a right to remain in a specific facility. *See O'Bannon v. Town Court Nursing Center,* 447 U.S. 773, 785-86, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980).[14] Other federal courts have concluded that there is no right to live in the institution of one's choice. *See Bruggeman ex rel. Bruggeman v. Blagojevich*, 324 F.3d 906, 910-911 (7th Cir. 2003); *Lelsz v. Kavanaugh*, 783 F. Supp. 296, 298 (N.D. Tex. 1991), affirmed, 983 F.2d 1061 (5th Cir.), cert. denied, 510 U.S. 906, 114 S.Ct. 287, 126 L.Ed.2d 236 (1993).

Moreover, the PASARR regulations require that the State determine if a particular nursing facility has the capacity and ability to ensure that a person with mental retardation or developmental disabilities can receive the specialized services that they need and will, in fact, receive a program of active treatment. *See* 42 C.F.R. § 126. If the PASARR review determines that a specific facility cannot do so, admission to, and continued stay in, that facility is impermissible under federal law. In addition, pursuant to the Agreement, the Court Monitor may determine that there is a pattern of deficiencies in providing active treatment at a specific nursing facility. In that event, DMR will not authorize any new admissions to that facility, and will encourage and support class members to move to the

[14] The Opposition relies heavily upon Judge Tauro's August 14, 2007 order that allows residents of the Fernald Developmental Center to remain at the facility, and that prevents the Commonwealth from closing that institution and transferring residents to other similar institutions. Opp. at 7-8. That reliance is misplaced. First, the order is on appeal to the First Circuit. Second, the order is inconsistent with professional judgment. Third, it is contrary to federal law, as interpreted and applied by several courts.. Finally, it is based entirely on the provisions of the prior settlement agreement and disengagement order in that case.

community or to another nursing facility. *See* Agreement, ¶¶ 25-26. In either event, it may be possible that residents in certain nursing facilities will not be able to remain in that facilities at public expense, particularly given the large number of nursing facilities that currently serve one or two class members and that are not likely, by the Court Monitor's own judgment, to provide active treatment.[15]

The PASARR regulations further provide that nursing facility placement is only authorized for a person with mental retardation or developmental disabilities if there is no community alternative, including home and community-based waiver programs and an ICF/MR. *See* 42 C.F.R. § 132. It may well be possible that future PASARR reviews will determine that there is a community program that is appropriate, available, and more effective in addressing the needs of a particular individual than remaining at a specific nursing facility placement.[16] In that case, continued nursing facility care would not be authorized or could not be paid for under federal law.[17]

Thus, contrary to the objections of the "Groton plaintiffs," the Agreement does not impose any obligation on the defendants to transfer class members from their current nursing facility to the community over the objection of the person, his/her guardian or family. Rather, it simply incorporates federal requirements concerning the public funding of inappropriate institutionalization, and requires DMR to take actions otherwise mandated by federal law, consistent with due process protections for class members.

---

[15] Given the large number of class members concentrated at the Groton Pediatric Nursing Facility, it is quite unlikely that this regulatory authority would impact its residents, although active treatment reviews of the facility scheduled for later this year or in early 2009 may provide additional information on this question.

[16] The Agreement contemplates this possibility, but does not make transfer mandatory. *See* Agreement, ¶ 21.

[17] This does not necessarily mean that the individual cannot remain at the facility, but simply that they cannot be subsidized with public funds in violation of federal law.

H. The Presence of Good Faith and the Absence of Collusion

After years of litigation on active treatment, and after the Court issued its April 10, 2007 Order followed by subsequent orders appointing a Court Monitor, adopting the Active Treatment Standards, and approving the Monitor's Active Treatment Protocol, the defendants proposed a different approach. The Commissioner of the Department of Mental Retardation and the plaintiffs then engaged in intensive negotiations over two months to produce the Agreement. Subsequently, the other defendants approved the proposed settlement, after careful consideration of the costs of compliance with the Court's current active treatment orders, with further litigation on noncompliance, and with the Agreement. At all times the parties negotiated in good faith and there never was any hint of collusion.

V. Conclusion

For the reasons set forth herein, as well as those in their initial memorandum, the Court should determine that the Settlement Agreement on Active Treatment is fair, reasonable, and adequate, should approve the Agreement, and should enter it as an order of the Court.

RESPECTFULLY SUBMITTED
THE PLAINTIFFS,
BY THEIR ATTORNEYS,

/s/ Steven J. Schwartz
Steven J. Schwartz
Cathy E. Costanzo
Center for Public Representation
22 Green Street
Northampton, MA 01060
(413) 586-6024
BBO# 448440
BBO# 553813

Matthew Engel
Disability Law Center
30 Industrial Drive East
Northampton, MA 01060

Frank Laski
Mental Health Legal Advisors Committee
399 Washington Street, 4th floor
Boston, MA 02108

Jeffrey Follett
Catherine Wicker
Foley Hoag
155 Seaport Blvd.
Boston, MA 02210-2600

CERTIFICATE OF SERVICE

Notice of this filing will be sent by e-mail to all parties below by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic filing. Parties may access this filing through the court's CM/ECF System.

Kenneth Salinger
Assistant Attorney General
One Ashburton Place
Room 2019
Boston, MA 02108

Marianne Meacham
General Counsel
Dept. of Mental Retardation
500 Harrison Avenue
Boston, MA 02118

Dated: May 15, 2008

/s/ Steven J. Schwartz
Steven J. Schwartz
Center for Public Representation
22 Green Street
Northampton, MA 01060
413) 586-6024